Excalibur Charter School, Inc. *and* Nathaniel Wicke.
Case 28–CA–023039

March 29, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

On January 26, 2011, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions with supporting argument, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

The Respondent is a nonprofit corporation that was established for the specific purpose of owning and operating a charter school under the laws of the State of Arizona. The judge found that the Respondent is not a "political subdivision" under Section 2(2) of the Act and, therefore, is subject to the Board's jurisdiction. The judge then found merit in many of the allegations contained in the complaint.[1]

As discussed below, we agree with the judge that the Respondent is not a "political subdivision." In addition, we agree with the judge that the Respondent violated Section 8(a)(1) by terminating employee Nathaniel Wicke.[2] We also agree with the judge's finding that the Respondent neither promulgated an unlawful rule nor threatened Wicke with unspecified reprisals in a January 8, 2010 email from Dean of Students Eric Walt.[3] The remaining issues contested by exceptions involve allegations that the Respondent violated Section 8(a)(1) by maintaining two work rules. We shall sever and retain those issues for future resolution.

In concluding that the Respondent is not a "political subdivision," the judge properly looked to the two-prong test articulated in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971). Under that test, an entity may be considered a "political subdivision" if it is either (1) created directly by the State so as to constitute a department or administrative arm of the government or (2) administered by individuals who are responsible to public officials or to the general electorate. The judge found that the first prong was not satisfied because the Arizona State Legislature established a framework and rules by which *individuals* could establish charter schools that were subject to approval by state officials. Regarding the second prong, the judge found that neither a public official nor the general electorate has any input in the selection of the Respondent's board members or staff members. He further found that, although the State has substantial regulatory authority over the Respondent, including approving the selected board members, that authority is not sufficient to satisfy the second prong.

The judge's decision in this case issued prior to the Board's decisions in *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016), and *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88 (2016), in which the Board, applying *Hawkins County*, concluded that the charter schools at issue were not "political subdivisions." In those cases, the Board found that neither Pennsylvania Charter nor Hyde Leadership was created directly by the state, but instead by private individuals. *Pennsylvania Virtual*, supra, slip op. at 6–7; *Hyde Leadership*, supra, slip op. at 5. The Board further found that

[1] In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by: (1) maintaining Nondisclosure and Internet Usage Rules in its employee handbook; (2) presenting its Solicitation Rule at new employee orientation without including the caveat that the listed "impermissible forms of solicitation" were only impermissible during working time; and (3) prohibiting employees from discussing their terms and conditions of employment in a December 18, 2009 email from the Respondent's founder and board member, Jeffery Parker.

[2] In its cross-exceptions, the Respondent does not challenge the applicability of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to Wicke's discharge. The only argument advanced by the Respondent that appears to pertain to the substance of the allegation is that the Respondent never told Wicke that it terminated him because he was trying to find out other people's salaries. But "an employer rarely admits that an employee has been discharged because of activities protected by the Act," *NLRB v. E.I. DuPont de Nemours*, 750 F.2d 524, 529 (6th Cir. 1984), enfg. in pert. part 263 NLRB 159 (1982); see also *Michigan Roads Maintenance Co., LLC*, 344 NLRB 617, 625 (2005). We therefore find the Respondent's lone argument to be without merit.

[3] On January 7, Wicke, apparently inadvertently, sent an email to Walt that criticized Walt's work. In response, Walt instructed Wicke, "Please don't send me any insulting communications, as well as copies of any such communications about me to others." Based on the circumstances here, we agree with the judge that Walt's reply does not violate Sec. 8(a)(1). We specifically reject the General Counsel's characterization of Walt's reply as an employer rule. See *Flamingo Las Vegas Operating Co.*, 359 NLRB 873, 874 (2013), affd. and incorporated by reference in 361 NLRB No. 130 (2014), enf. granted in part and denied in part on other grounds 2016 WL 3887170 (D.C. Cir. 2016) (not reported in F.3d).

neither charter school was administered by individuals who are responsible to public officials or the general electorate. *Pennsylvania Virtual*, supra, slip. op. at 7–8; *Hyde Leadership*, supra, slip op. at 6-7. In doing so, the Board explained that "the 'relevant inquiry' is whether a majority of the individuals who administer the entity—the governing board and executive officers—are appointed by and subject to removal by public officials." *Pennsylvania Virtual*, supra, slip op. at 7. As part of this inquiry, "[t]he Board examines whether the composition, selection, and removal of the members of an employer's governing board are determined by law, or solely by the employer's governing documents." Id. Ultimately, "[w]here the appointment and removal of a majority of an entity's governing board members is controlled by private individuals—as opposed to public officials—the entity is subject to the Board's jurisdiction." Id.

Applying *Pennsylvania Virtual* and *Hyde Leadership*, we reach the same conclusion as did the judge here. We agree with the judge that the Respondent was not created directly by the state and thus does not satisfy the first prong of *Hawkins County*. As in *Pennsylvania Virtual*, the Respondent "was not created directly by any [State of Arizona] government entity, special statute, legislation, or public official, but instead by private individuals as a nonprofit corporation." 364 NLRB No. 87, slip op. at 6. We also agree with the judge that the Respondent is not administered by individuals responsible to public officials or the general electorate. The Respondent's board members are appointed and subject to removal only by the other sitting members of its board, not by public officials. The method of selecting board members is dictated by the Respondent's charter and bylaws, and not by any State or local law or regulation. See *Pennsylvania Virtual*, supra, slip op. at 8; *Hyde Leadership*, supra, slip op. at 6–7.[4] As there is no evidence that the Respondent is administered by individuals responsible to public officials or the general electorate, "our analysis properly ends."[5] We thus conclude that the Respondent is not a "political subdivision" under the second prong of the *Hawkins County* test.[6]

AMENDED REMEDY

In addition to the remedies recommended by the judge, we shall order that backpay be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, in accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall order the Respondent to compensate Wicke for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. We shall also order the Respondent to compensate employee Nathaniel Wicke for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 28 allocating backpay to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).[7]

Further, to remedy the Respondent's maintenance of rules that we find unlawful in the absence of exceptions, we shall order the Respondent to rescind or modify its unlawful rules and to notify employees of these actions in accordance with *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

We shall also modify the judge's recommended Order to conform to our findings and to the Board's standard

[4] We observe that, in reaching his conclusion under the second prong, the judge found that the Arizona State Board of Charter Schools must approve the Respondent's board members. Our review of the record reveals that the Respondent's charter application included a list of its initial board members, that its charter requires it to notify the State through the charter amendment notification process when it appoints new board members, and that its charter and governing documents impose a background and fingerprint check requirement on its board members. As we found in *Hyde Leadership*, the foregoing is insufficient to establish that the Respondent's board members are accountable to public officials or the general electorate. See 364 NLRB No. 88, slip op. at 6-7.

[5] *Pennsylvania Virtual,* supra, slip op. at 9. Because the above analysis yielded a "clear answer," the consideration of other factors is not necessary. Id.

[6] Chairman Kaplan notes that even if statutory jurisdiction exists under Sec. 2(2), the Board may nonetheless decline to exercise jurisdiction over charter schools as a class or category of employers, consistent with Sec. 14(c)(1) of the Act. However, the Respondent does not argue that the Board should decline jurisdiction on this basis and, in any event, the Board has expressly rejected declining jurisdiction over charter schools as a class in *Pennsylvania Virtual*, supra, slip op. at 9–10, and *Hyde Leadership*, supra, slip op. at 7–8. Chairman Kaplan believes this precedent might warrant review by a full five-member Board in a future case.

[7] Regarding the remedy, the Respondent argues that Wicke's employment contract was set to expire on June 30, 2010, and, therefore, that he is not entitled to reinstatement and that the backpay period should terminate as of that date. The Respondent will have the opportunity to demonstrate in compliance that it would have terminated Wicke's employment on June 30 and, thereby, limit its remedial obligations to him. Cf. *Dawson Carbide Indus.*, 273 NLRB 382, 382 fn. 3 (1984), enfd. 782 F.2d 64 (6th Cir. 1986) (leaving to compliance employer's contention that unlawfully laid off employees should not be awarded backpay for certain periods because they would have been laid off in any event for economic reasons).

remedial language and to provide for notice-posting in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

Finally, we have substituted a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB 694 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, Excalibur Charter Schools, Inc., Apache Junction, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Prohibiting employees from discussing their terms and conditions of employment with other employees.

(b) Presenting the Solicitation Rule to employees without including the caveat that the prohibition on "impermissible forms of solicitation" only applies during working time.

(c) Maintaining a Non-Disclosure Rule that prohibits employees from discussing employee contract terms, compensation, and compensation data.

(d) Maintaining an Internet Usage Rule that prohibits employees from using the internet to send or post confidential information, which encompasses employee contract terms and compensation.

(e) Discharging employees because they engage in protected concerted activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the:

(i) Non-Disclosure Rule prohibiting employees from discussing employee contract terms, compensation, and compensation data.

(ii) Internet Usage Rule prohibiting employees from using the internet to send or post confidential information, which encompasses employee contract terms and compensation.

(b) Furnish employees with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(c) Within 14 days from the date of this Order, offer Nathaniel Wicke full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Nathaniel Wicke whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Compensate Nathaniel Wicke for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Nathaniel Wicke, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Apache Junction, Arizona, facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 14, 2009.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(i) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that issues raised with respect to the Respondent's maintenance of a solicitation rule that prohibits employees from distributing literature not approved by the Respondent, and an Employee Conduct and Work Rule that prohibits both "boisterous or disruptive activity in the workplace" and "insubordinate or other disrespectful conduct," are severed from this case and retained for future resolution.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 29, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from discussing your terms and conditions of employment with other employees.

WE WILL NOT present the Solicitation Rule to you without including the caveat that the prohibition on "impermissible forms of solicitation" only applies during working time.

WE WILL NOT maintain a Non-Disclosure Rule prohibiting you from discussing your contract terms, compensation, and compensation data.

WE WILL NOT maintain an Internet Usage Rule prohibiting you from using the internet to send or post "confidential information," which encompasses employee contract terms and compensation.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind:

the Non-Disclosure Rule prohibiting you from discussing your contract terms, compensation, and compensation data,

the Internet Usage Rule prohibiting you from using the internet to send or post "confidential information," which encompasses employee contract terms and compensation.

WE WILL furnish you with inserts for the current employee handbook that (1) advise you that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

WE WILL, within 14 days from the date of the Board's Order, offer Nathaniel Wicke full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Nathaniel Wicke whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make Wicke whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Nathaniel Wicke for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a

report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Nathaniel Wicke, and WE WILL, within 3 days thereafter, notify Nathaniel Wicke in writing that this has been done and that the discharge will not be used against him in any way.

EXCALIBUR CHARTER SCHOOL, INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-023039 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Eva Herrera, Esq. and *Paul Irving, Esq.,* for the General Counsel.

Leonidas Condos, Esq. (The Condos Law Group), counsel for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on October 19, 2010, in Phoenix, Arizona. The complaint herein, which issued on July 30, 2010, and was amended on August 26, 2010, and September 20, 2010, was based upon an unfair labor practice charge that was filed by Nathaniel Wicke on May 14, 2010. The complaint alleges that Excalibur Charter School, Inc., herein called the Respondent and/or the school, has maintained overly broad and discriminatory rules in its employee handbook regarding the nondisclosure of "confidential" information, including certain internet usage, solicitations and employee conduct and work rules and, through its handbook, has threatened its employees who violate these rules with discipline or discharge. The complaint further alleges that on about December 19, 2009, the Respondent, by Jeffrey Parker, who incorporated the Respondent, is a trustee and is on the Board of Directors, promulgated, maintained and enforced an overly broad and discriminatory rule prohibiting employees from discussing their wages or terms of conditions of employment with other employees, and Respondent, by Eric Walt, Respondent's dean of students, on about January 8, 2010, promulgated and maintained an overly broad and discriminatory rule prohibiting employees from communicating with one another regarding their terms and conditions of employment, and threatened employees who violate the rule with unspecified reprisals. The complaint also alleges that since about January 10, 2010, the Respondent, by Carol Parker, a charter owner, has reaffirmed these unlawful rules. The complaint further alleges that since about December 19, 2009, Wicke and other employees of the Respondent have concertedly complained to the Respondent about terms and conditions of employment, among other things that the Respondent was not providing teachers with technology and equipment that the Respondent had received grants for, and that the teachers need in order to properly perform their jobs, and that on about January 19, 2010, the Respondent discharged Wicke because he had engaged in these protected concerted activities. These actions by the Respondent are alleged to have violated Section 8(a)(1) of the Act.

I. JURISDICTION

Respondent has been engaged in the operation of a charter school for kindergarten through the 12th grade in the State of Arizona since about 1999. While admitting that it operates a charter school in the State of Arizona, and that during the twelve month period ending May 14, 2010, it derived gross revenues in excess of $1 million from various funding sources and, during the same period, purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Arizona, Respondent denies that it is subject to the Board's jurisdiction under Section 2(2) of the Act because of the control exerted by the State of Arizona in the operation of the school.

Parker is the individual who was primarily responsible for incorporating the Respondent and is a trustee as well as being on its board of directors. Carol Parker, Parker's wife, was employed by the Respondent until August 2, 2010, primarily in human resources as a district administrative assistant, and was also a member of the school's board of directors from 1999 to August 2, 2010, when she resigned from the Board. Originally, the Board of Directors was composed of interested parents of students at the school, and others who were willing to participate; over the past 11 years the board members have changed. The names of the board members are submitted to the State Board for Charter Schools, herein called the State Board, for approval. Parker was personally responsible for obtaining the charter for the school from the State of Arizona. In the process of obtaining the charter, and approval of the state, which took over a year, he submitted the application, spoke to people who were knowledgeable on the subject, prepared ". . . a good mission statement and all the necessary paperwork, and then submitted it to the State, and eventually they approved it." As part of the application to the State Board, he had to present a curriculum, a business plan, a mission statement, and a three to five year budget, all of which were subject to approval by the State Board. He also had to notify the State Board of the location of the school, together with the number of students who were expected to attend. In addition, he provided the State Board with the Articles of Incorporation and its bylaws, as well as the names of the Respondent's Board members. Amendments to its charter, changes in board members or the location of the school must be, and have been, submitted to the State Board for ap-

proval. Further, the State Board may conduct site visits to the school, announced or unannounced, and may take disciplinary action against the school for failure to meet the academic needs of the children, or what it perceives as threats to the health and safety of the school children.

The school was originally sponsored by a local school district which charged the Respondent $60,000 a year for the sponsorship; they changed to the State Board, which does not charge to be its sponsor. The school's charter is for a fifteen year period, although the State Board has the authority to revoke the charter prior to the time. At the conclusion of that period, the school reapplies to the State Board for a new charter. Parker and Ray Webb, the school principal, are responsible for the hiring and firing of employees; the State Board has no responsibility for that, or for the administration of the school. The State Board enforces the regulations that must be met by all charter schools within the State of Arizona, but it does not oversee the day-to-day operation of the school. That is handled, at the top, by Parker and Webb. At the present time there are 265 students and about 40 employees. Each teacher hired by the school has to be approved by the State Board, which checks to see that he/she has the necessary educational requirements, although charter school teachers are not required to be certified by the State of Arizona.

The school's yearly gross revenue, presently approximately $2.5 million, is dependent upon the number of students attending. Approximately $2.3 million of this was received from the State of Arizona. The balance was from the federal government, private contributions, and other sources.

The Supreme Court, in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee,* 402 U.S. 600, 604 (1971), set out a two part test for determining whether employers are exempt as "political subdivisions" of the state under Section 2(2) of the Act and are therefore exempt from the Act: (1) was the entity created directly by the state so as to constitute departments or administrative arms of the state? or (2) is it administered by individuals who are responsible to public officials or to the general electorate? The Court also stated (at p. 604) that it is the "actual operations and characteristics" of the employer that determine whether it is a "political subdivision" within the meaning of the Act. Also on point is *Kentucky River Community Care, Inc. v. NLRB*, 193 F.3d 444 (6th Cir. 1999).

Clearly, the facts herein do not satisfy the first prong of the test set out in *Hawkins* that the Respondent was created directly by the state so as to constitute departments or administrative arms of the state government. Rather the legislature established a framework and rules by which individuals could establish charter schools that were subject to approval by state officials. The second prong of the test is whether the school is administered by individuals who are responsible to public officials or to the general electorate. I find that the Respondent fails this test of *Hawkins* as well. The school was the idea of, and was incorporated by, Parker and Carol Parker in 1999. They solicited individuals from the area, principally interested parents, to act as members of the school's board of directors. No public official or member of "the general electorate" had any input in the selection of board members, principals, administrators, teachers or students. While the State Board has substantial regulatory authority over charter schools, and must approve the board members, the school's charter, its location, mission, curriculum, business plan, the number of students attending the school, and budget, and checks to see that the teachers possess the necessary educational requirements, that is not enough to exempt the school pursuant to Section 2(2) of the Act. As the Court stated in *Kentucky River,* supra:

> To be sure, the Secretary of the Cabinet for Human Resources exercises significant oversight of KRCC's operations . . . but it does not necessarily follow that such oversight means that the individuals in charge of KRCC are responsible to public officials. We find nothing in the oversight authority of the Cabinet for Human Resources or in the internal structure of the KRCC that makes the individuals in charge at KRCC responsible to the Cabinet for Human Resources.

Similarly, in the instant matter, although the State Board exercises significant oversight over the operations of the Respondent and all charter schools in the state, the day to day operation of the school, including the hiring and firing of teachers and other employees, is handled by Parker and Webb. I therefore find that the Respondent is an employer within the meaning of Section 2(2) of the Act.

II. THE FACTS

All employees are given a copy of the Respondent's Employee handbook and they are told that it is their responsibility to read and understand it. Carol Parker testified that at orientation sessions for new employees in about September and January, the handbooks were distributed to the employees and she conducted a Power Point presentation to make it more palatable. These orientations last a couple of hours and cover the policies discussed in the handbook along with other policies and procedures. One of the subjects discussed was that the school felt that it was "inappropriate" for personnel to discuss wages with each other. During these sessions, she stated:

> We felt that it was inappropriate for personnel to be discussing wages with each other . . . it just wasn't appropriate or ethical . . . or professional to be discussing with each other wages. We are there to teach kids and do our job, and whatever your job description is, that is what you were to be held accountable for and paid for, and just to take care of school business.

Parker was also questioned about this subject and after being shown the affidavit that he gave to the Board, he eventually testified that in their annual staff meetings, he and Carol Parker told the employees not to discuss their wages with other employees because it could cause a problem among the employees: "If people hear other's wages . . . there may be hard feelings." Webb testified that in about March 2010, he told his receptionist, Angie Baca, that she should not discuss her wages with other people, and he did so at the request of Carol Parker.

Wicke testified that after he was hired he attended an orientation session conducted by Carol Parker, who discussed the policies and programs at the school. The handbook was distributed to all those present and he testified that he remembers Carol Parker saying: "Please do not discuss your pay, your

salary, your jobs or title with others." However, he also testified that he was never told, at that time or at any time, that if he continued to compare salaries at the school, that he would be terminated.

There are a number subjects covered by the Employee Handbook that are alleged to violate the Act.

> Non-Disclosure:
>
> The protection of confidential business information and trade secrets is vital to the interests and the success of Excalibur Charter Schools, Inc. Lists of students, parents and staff are confidential and for the purpose of conducting school business only. They may not be sold, lent, given or used for any other purpose, including solicitation of business. All employee contracts are individually negotiated. Therefore, discussing specific employee contract terms and compensation is prohibited and subject to disciplinary action, including but not limited to termination.
>
> Confidential information includes, but is not limited to, the following examples:
>
> Compensation data
>
> Internet Usage:
>
> The following behaviors are examples of previously stated or additional actions and activities that are prohibited and can result in disciplinary action:
>
> Sending or posting confidential material, trade secrets or proprietary information outside the organization.
>
> Sending or posting messages or material that could damage the organization's image or reputation.
>
> Sending or posting chain letters, solicitations, or advertisements not related to business purposes or activities.
>
> Solicitation
>
> Excalibur Charter Schools, Inc. recognizes that employees may have interest in events and organizations outside the workplace. However, employees may not solicit or distribute literature concerning these activities during working time. (Working time does not include lunch periods, work breaks or other periods in which employees are not on duty.)
>
> Examples of impermissible forms of solicitation include:
>
> The circulation of petitions.
> The distribution of literature not approved by the employer.
> The solicitation of memberships, fees, or dues.
>
> Employee Conduct and Work Rules
>
> To ensure orderly operations and provide the best possible work environment, Excalibur Charter Schools, Inc. expects employees to follow rules of conduct that will protect the interest and safety of all employees and the organization. It is not possible to list all the forms of behavior that are considered unacceptable in the workplace.
>
> The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment:
>
> Boisterous or disruptive activity in the workplace.
> Insubordination or other disrespectful conduct.

Wicke was hired by Parker in July 2009 on a full time basis as the school's Title I Coordinator at an hourly wage rate of $15. The parties signed an Employment Agreement effective from July 1, 2009, to June 30, 2010, specifically stating that it is "At-Will Employment" that is terminable by either party with or without cause. Title I funds are given by the Federal Government to assist schools that are servicing underprivileged children to advance reading, mathematics and other subjects. Wicke's job, basically, was to keep track of the Title I funds that the school received and to see that they were spent properly. Parker testified that the school usually receives approximately $200,000 annually in Title I funds, and testified that Wicke's job as Title I Coordinator was to review the grants and to ensure that the funds from these grants was spent appropriately.

The Respondent conducted monthly Administrative Team Meetings to discuss outstanding issues at the school. The meetings were chaired by Parker and Carol Parker, and were attended by the school principals, and the people in charge of Special Education, Transportation, and Title I (Wicke). Parker testified that Wicke never raised any issues or made any comments at these meetings, or on other occasions, about teachers or staff not receiving certain technology as required by the Title I grants received by the school. Parker was asked if he ever had conversations with Wicke regarding his concerns that the school was not in compliance with its Title I grants; he answered: "Not that I can remember." On January 8, 2010, Wicke sent a lengthy e-mail entitled: "2010-ARRA Title I Grant" to Parker, Carol Parker, Webb, Walt and others stating, *inter alia*, that the school was not in compliance with a certain grant, and recommending certain action that would bring it into compliance. Parker was asked if he had ever received any e-mails from Wicke regarding the lack of compliance with Title I grants, and he said that he couldn't remember. He testified that he received the January 8, 2010 email, but he did not speak to Wicke about this subject after receiving the e-mail. He also testified that Title I grants can be amended and modified, and the Title I grant that Wicke was referring to in his e-mail had not been finalized at the time.

Carol Parker testified that Wicke attended the monthly district team meetings at the school, and at one of these meetings he stated that he thought that the teachers did not have the technology that they should have received. At that point he was "corrected" by Webb, Parker, the IT Director, Mark Sheen, or the Business Manager, Ted Polzin, who told him that "he didn't have his facts right." In addition, sometime in the Fall of 2009, at a meeting with Carol Parker and Webb, Wicke brought up the subject of computers and Title I and she said that the computers had been purchased with the Title I funding: "He thought that he knew how it all worked, but he was not correct." Other than on these two occasions Wicke never spoke to her about his allegation that the school was not in compliance with Title I funding. She received his January 8, 2010 email, but did not

pay much heed to it because she was not his supervisor, nor was she involved in technology issues at the school. Another reason she did not get involved in this issue: "It wasn't factual. The teachers had their computers. We had the computers in the lab, so . . . it wasn't an issue. I don't know why he kept bringing that up, because it wasn't an issue."

Webb testified that as principal, it was his obligation to be certain that the school was in compliance with Title I requirements, so he spoke about it to Wicke a couple of times a week. Wicke first brought up the subject in October or November 2009:

> He was concerned . . . that there were computers that were written into the grant, and he was concerned . . . that they weren't furnished by the grant, and there was a time beforehand where teachers had donated monies and bought computers. Those computers were given to the teachers, and then there was a group of computers that were bought by grant monies, and that were put into a computer lab.

In response to Wicke's concern, Webb told him that the teachers donated money for the computers that they received, and that the computers from the grant money were in the computer lab. As to how many times Wicke discussed this subject with him, he testified, "He was fixated on it for quite a long time." He testified that he always believed that the school was in compliance with all the Title I requirements because he saw the Title I funded computers in the computer lab and the high school.

Wicke testified that his initial discussion with someone from the school about computers was with Webb in about August 2009; Webb told him that the teachers were upset because they were told that they had to turn back half of their government grant money so that they could purchase computers for their classroom use. Over the next few months he had occasional discussions with Webb about the subject, and discussed the subject with two teachers at the school in about December. In addition, at an administrative team meeting in December he stated his concern that they were not spending the Title I money in an appropriate fashion. He testified that there was "tension" but no response from those present. In December 2009, Wicke met with Webb and Carol Parker, and he told them that the Drop-Out Prevention grant guidelines, under Title I, were not being met by Walt; Carol Parker responded, "This isn't about him." He then spoke about the Title I grants for the computers and that he felt that they were not in compliance with the requirement of Title I. At the conclusion of this testimony, Wicke testified that this meeting was not in December 2009, but was on January 15, 2010, a few days prior to his termination.

On January 7, 2010, Wicke sent a two page e-mail entitled: "Dropout prevention Title I compliance monitoring" to Walt, Webb, Parker, Carol Parker and Janette Benziger, who writes Title I grants for the school. The e-mail states, inter alia:

> This is Nathan Wicke, your friendly district Title I director. I am monitoring this Dropout prevention program based off the 2010—AIMS Intervention & Dropout Prevention Program grant. Please read all below, which comes directly from the grant, paying specific attention to the wording in color. As you will read in the grant narrative below, I am monitoring this as the Title I director because we are using this program to meet Title I goals . . . Please respond to me with remarks regarding all the questions I ask you as you read this. I sent out an email yesterday explaining what the state informed us we could use as plans. Please review that email for clarification. I appreciate your cooperation in having all of us make sure this program is in Title I compliance. Thanks and have a great day.
>
> The "at risk" population target for service included students from Avalon Elementary and Excalibur High School. Both of these schools failed to make AYP for the 2008 school year and Excalibur High School was identified as Underperforming for the 2009 school year. The schools are in economically depressed areas and both schools qualify for the free and reduced lunch plan.

The e-mail then lists five "priorities", involving students who failed standardized tests, students behind in their credits, students who are pregnant or parenting, disabled or handicapped, and students with discipline problems. The e-mail then asks Walt for the names of all students and their plans and portfolios, stating:

> I need to see them and make sure they meet compliance standards, so when the state comes to visit and monitor…we will have all our compliance "ducks" in a row.

The final portion of the e-mail relates to the seventh and eighth grades:

> The priorities for 7th–8th grade inclusion are getting students to grade level academic proficiency prior to secondary school, facilitating long term goals for students to motivate them through graduation, and to give students basic career research and employment skills. Mr. Webb, who is doing this at your school and what paper evidence can you give me showing students' progress which I can put in the title I folders?

An hour and a half later, Walt responded to Wicke's e-mail, with a one page e-mail, stating, inter alia, that the AIM program is defunct, and will not be returning, and that Wicke should contact Benziger, who wrote the grants, for her assistance on some of his concerns. Later that afternoon, Wicke meant to send an e-mail to Jeff and Carol Parker, but inadvertently sent it to Walt:

> This is what Eric sent me regarding reporting for the dropout prevention program which I understood from you, Jeff, is the main way that you are paying Eric his salary. As you can read in this e-mail, he says that the district did not get the money for this grant and program and that it is dead. I need your council and direction regarding what he said in this email, not only about the dropout prevention program, but all grants and me following them to make sure we are in compliance. I was not given any training from you how to do Title I compliance and this is what I have figured out how to do: to follow grants wording. I have learned to do this compliance this way from Jill and the state. So when Eric, whose own admission by saying I should talk with Jill, has limited knowledge about Title I and suggests that I should not use grants as a basis for measuring compliance, I am a little more than leary of his lack of ex-

> perimental knowledge advice. My question to you is what do you want me to do? Who do you want me to listen to and how do you want me to do my job? I feel you have confidence in me and feel you are and have been happy with the way I have been doing my job. Please let me know.

The following morning, Walt sent an e-mail to Wicke: "Please don't send me any insulting communications, as well as copies of any such communications about me to others."

Wicke testified that he sent this e-mail because he was reviewing the grants that the school had received, in particular, the 2010 AIMS Intervention Drop Out Prevention grant, which is part of the Title I documentation that has to be submitted to the state, and he wanted to notify Parker and the others that he was not getting cooperation from Walt.

Wicke had a meeting with Carol Parker and Webb on January 15, 2010; she said that she wanted to become more involved in the Title I programs. He told her of his concerns with the grants and she told him that he should bring them up at the school's monthly administrative team meetings. On the following Monday, January 19, 2010, he was terminated.

Wicke testified that his initial discussion about pay at the school was with Webb in about August or September 2009. At that time Webb said that he was upset that Walt was making more money than he was. Wicke testified that he was not upset about it because he did not have Walt's experience or credential. Rather he told Webb that Walt was not properly complying with the Title I requirements in performing his job. In addition, in about December, he was talking to the reading specialist at the school and asked her how she liked her job, and she told him what her salary was. In December he met with Parker and Carol Parker shortly after he received his degree in a Masters Program. He gave Parker a list of his responsibilities at the school, and asked for an increase in pay based upon his job performance. Wicke mentioned an employee whose salary he learned from Webb, and also mentioned the reading specialist at the school who told him of her salary. Parker said that he would look at the budget, discuss it with others, and would let him know. About a week later, Wicke received an e-mail response from Parker dated December 18, 2009, stating, inter alia:

> I have talked with Ted, Carol and Mr. Webb. It appears that we have way to [sic] many hands in the pot…If you have expressed a desire to move after this year, I can't make that investment now for there just isn't any money or haven't you heard? When talking with Ted, we may be able to give some kind of bonus at the end of the year, depending on our windfall, if any. Mr. Webb says that your work is good and that you are very diligent, and I already knew that. But coming from others helps. The fact is, that with the demise of 301 monies down to less than 50% and the state looking for more cuts, it comes down to a wait and see. You are a valuable asset, I've said that to Carol many times. Yet, when you took the job, we agreed on an amount and that should be good until we reassess the situation. One last thought, please in the future, don't discuss your pay or your plans with others when it comes to things like this. It stirs the pot too much. I am the one to bring it to. Sometimes things don't happen as fast as we wish, be patient. When you want to move on, I am completely for that…I will do what I can, but I have 49 other employees who have been with us far longer. You are worth it, let's see how it rolls out after Christmas vacation. We love you, Jeff and Carol.

Carol Parker testified that the first time that she saw Parker's December 18, 2009 email to Wicke was when she gave her affidavit to the Board agent in this matter. However, she was present at the latter part of the meeting that Parker had with Wicke in December. The only thing that she could recollect about that meeting was Wicke stating that he thought that the school's grant writer, Jill Gaitens was unqualified for the job, which Carol Parker disagreed with. At the January 15, 2010 meeting that she had with Wicke and Webb, Wicke attempted to bring up Walt's wages, but she stopped him and said that she wasn't there to discuss Walt's wages because Walt had a different job: "I wasn't even going to go down that avenue with him." Webb testified that in about late November or December 2009, he and Carol Parker met with Wicke in his office. At this meeting, Wicke asked them why Walt was earning more money than he was, and Carol Parker told him that was between management and Walt. Wicke only responded that as the Title I Director he felt that he deserved to be paid more. Webb also testified that in about December, after Wicke obtained his Masters Degree, he noticed a change in Wicke: "It was more of an arrogance. . . now that. . . he had received that degree, he was worth. . . more and more money."

Wicke was terminated on January 19, 2010. That day was a holiday, and there was a voice mail on his phone stating that his services were no longer needed; no reason was given. Parker was questioned by counsel for the General Counsel about his reason for terminating Wicke. Because his testimony is so difficult to follow (and, often, to believe) it is best to start with the affidavit that he gave to the Board agent investigating this matter. In that affidavit he stated:

> Nathan Wicke was terminated on 1/19/2010. I made the decision to terminate him, and I was the only one involved in making that decision. The reason I terminated Wicke was disruption of the school atmosphere and going outside the boundaries of his job description by looking into other peoples' salaries, comparative to his own. This was none of his business. With respect to disrupting the school atmosphere, Wicke personally questioned me regarding how I paid people. This suggested a loyalty problem with him. I cannot remember exactly what he said to me that made me feel this way, but this was it.

His affidavit also states:

> Our IT guy [Sheen] was another person that I learned that Wicke had gone to and asked what his salary was, and they had been discussing what they were worth as employees, and Wicke came to me and used that information to ask for a pay increase.

When questioned about these portions of his affidavit, Parker testified: "I am sure that it is accurate."

Parker was asked by Counsel for the General Counsel:

> Q And the reason you terminated him was disrupting the school atmosphere and going outside the boundaries of his job description by looking into other people's salaries; is that correct?
>
> A No to the last part and yes to the first part of the question.

In answer to no particular question, Parker testified:

> And, so, he had his choices, and with all the other stuff that . . . that bothered him that I saw…and with his comments to people, and e-mails and so forth, it was obvious that he wasn't happy there, and he wasn't happy with $15.00 an hour, so he had choices.

He testified that although "there were some good things being done," Wicke ". . . was not focused on his work, he is focused on some other agenda . . . his only agenda was himself, in my opinion." He also testified that it was not until after Wicke was fired that he learned about his conversations with other employees about their salaries, although he never spoke to him about his termination.

Carol Parker was involved in discussions with Parker and Walt regarding the decision to terminate Wicke, but the final decision was Parker's. Their discussions entailed:

> Just the problems, insubordination, the difficulty of working with him. He was very abrasive. He just caused a lot of problems on campus. I didn't appreciate being accused of things that weren't true . . . His accusations of misappropriation of funds which were absolutely not true, He is definitely not a team player. I felt very much on the defensive with him. He was doing his very best to find everything wrong that he could possibly find.

She testified further that the work that he was directed to perform- school-wide plans and Title I grants- was not being taken care of. He was interested in financial matters and was upset that he was not included in those decisions. She received complaints from Sheen, Webb, Walt, Benziger, and Gaitens who were offended by his approach to them and by his emails, and they said that they found him unprofessional, but she never met with Wicke to tell him of these concerns. Gaitens sent Parker and Carol Parker an e-mail dated October 12, 2009, stating that she felt uncomfortable talking to Wicke, that he feels that he is being "left out of the loop," and that he intends to leave the school at the end of the year to earn more money. In addition, Wicke told her that he didn't believe that Walt was properly performing his job. In a series of e-mails on January 6, 2010, to Parker, Carol Parker, Webb, Walt, and others, Wicke referred to a conversation that he had with someone from the Arizona Department of Education. He referred to Title I programs and stated: "So if anyone in the future does not like me telling them their specific program is not in compliance in some way, specifically how it relates to Title I, which our schools are, do not take it out on me, I am merely the messenger; delivering what the state tells me to do after visiting and talking with them." Carol Parker responded that, in the future, he should discuss these issues with people from the school prior to having discussions with representatives of the state: "I would rather have stronger 'horizontal' communications within our district than the 'vertical' communication you don't hesitate to engage in with the state." When Wicke responded that he did not feel that people were listening to him when he communicated "horizontally," Carol Parker sent him two emails, the last one (on January 6, 2010) ending: "Thank you for what you do. I truly believe we are much more compliant with our Title I program than we have been in the past due to your efforts. You are moving us forward leaps and bounds."

Webb testified that he was not involved in the decision to terminate Wicke and he learned of the decision first from Parker and, later, from Carol Parker. Neither one told him why Wicke was terminated, and he did not ask about it. "It is my understanding that he was terminated because of lack of performance." Although he is sure that somebody told him that, he cannot specifically recall somebody saying that, although it probably was discussed at an administrative team meeting.

III. ANALYSIS

It is alleged that since about November 14, 2009, the Respondent has maintained the following overly broad and discriminatory rules in its Employee Handbook: Non-Disclosure, Internet Usage, Solicitation, and Employee Conduct and Work Rules, as reinforced by Carol Parker in her Power Point presentations to employees, and since on about November 14, 2009, the Respondent threatened employees who violated these rules with discipline or discharge. The Complaint further alleges that on about December 19, 2009, Respondent, by Parker promulgated, maintained and enforced an overly broad and discriminatory rule prohibiting employees from discussing their wages or terms of conditions of employment with other employees, and on about January 8, 2010, Respondent, by Walt in an e-mail, promulgated and has maintained an overly broad and discriminatory rule prohibiting employees from communicating with other employees regarding their terms and conditions of employment, and threatened employees who violate the rule with unspecified reprisals. It is further alleged that since on about January 10, 2010, Respondent, by Carol Parker reaffirmed these rules and that on about January 19, 2010, the Respondent discharged Wicke because he violated these rules and because he concertedly complained to the Respondent about the Respondent's employees' wages and conditions of employment, by complaining that, among other things, the Respondent was not providing teachers with the technology and equipment that the Respondent had received grants for, and which the teachers needed to properly instruct their students. It is alleged that by these actions the Respondent violated Section 8(a)(1) of the Act.

Credibility obviously plays an important part in this case and, stated briefly, Parker was one of the least credible witnesses I have ever experienced, and I say that reluctantly because of his admirable deed in establishing the school. However, when it came to answering a question from Counsel for the General Counsel, he was totally incapable of answering in a direct and believable manner. On the other hand, Wicke, Carol Parker, and Webb appeared to be credible witnesses attempting to testify in an honest and truthful manner.

In *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), in determining the legality of certain portions of the employer's

employee handbook, the Board stated:

> In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.

Further, in determining that one of the employer's standards of conduct prohibiting "unlawful or improper conduct" off its premises was not unlawful, the Board's majority stated at p. 827:

> . . . we do not believe that this rule can reasonably be read as encompassing Section 7 activity. In our view, employees would not reasonably fear that the Respondent would use this rule to punish them for engaging in protected activity that the Respondent may deem to be "improper." To ascribe such a meaning to these words is, quite simply, farfetched. Employees reasonably would believe that this rule was intended to reach serious misconduct, not conduct protected by the Act.

In *Flamingo Hilton-Laughlin*, 330 NLRB 287, 289 (1999), the Board had to determine the legality of a rule prohibiting "off-duty misconduct." Citing *Lafayette Park,* supra, the Board found that this rule could not reasonably be read as encompassing Section 7 rights, or that the employer would use it to punish its employees for engaging in protected activities, and it therefore did not violate the Act. In *NLS Group,* 352 NLRB 744, 745 (2008), the Board summarized these findings as follows:

> If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; (3) the rule has been applied to restrict the exercise of Section 7 rights.

The Non-Disclosure provision herein includes some clearly lawful provisions, such as restrictions on the dissemination of information regarding students and parents. However, it also states: "All employee contracts are individually negotiated. Therefore, discussing specific employee contract terms and compensation is prohibited and subject to disciplinary action, including but not limited to termination." As this rule explicitly restricts Section 7 activity of discussing wages and other terms of employment, it, together with the Power Point presentation discussing it, clearly violates Section 8(a)(1) of the Act, as does the following provision that confidential information includes "Compensation data."

The Internet Usage provision states, inter alia:

> The following behaviors are examples of previously stated or additional activities that are prohibited and can result in disciplinary action:
>
> Sending or posting confidential material, trade secrets, or proprietary information outside of the organization.

Because the Non-Disclosure rule discussed above equates employee contract terms and compensation with confidential information, employees reading the Internet Usage restrictions could reasonably interpret it as encompassing their terms and conditions of employment, i.e, Section 7 activity. I therefore find that this provision, together with the Power Point presentation enforcing it, violates Section 8(a)(1) of the Act. The Solicitation provision in the Employee handbook states that employees

> . . . may have interests in events and organizations outside the workplace. However, employees may not solicit or distribute literature concerning these activities during working time. (Working time does not include lunch periods, work breaks, or any other period in which employees are not on duty.)
>
> Examples of impermissible forms of solicitation include:
>
> The circulation of petitions.
> The distribution of literature not approved by the employer.
> The solicitation of memberships, fees, or dues.

The restrictions in the Employee Handbook clearly curtail employees' Section 7 rights, except for the *caveat* that it does not apply during lunch periods, work breaks or any other period in which the employees are not on duty. As it only applies during employees' working time, it is a lawful restriction on their activities. *Our Way, Inc.*, 268 NLRB 394 (1983). As Carol Parker's Power Point presentation does not include the "working time" *caveat*, I find that it violates Section 8(a)(1) of the Act. The final provision of the Employee handbook being challenged is entitled "Employee Conduct and Work Rules." The prohibited conduct therein is boisterous or disruptive behavior in the workplace and insubordination or other disrespectful conduct. As the Board stated in *Lafayette Park,* supra, I do not believe that this provision can reasonably be read as restricting Section 7 activity, and therefore recommend that this allegation be dismissed.

It is next alleged that on about December 19, 2009, Respondent, by Parker, promulgated, maintained and enforced an overly broad and discriminatory rule prohibiting the school's employees from discussing their wages or terms and conditions of employment with other employees, and on about January 8, 2010, Respondent, by Walt, by e-mail, promulgated and maintained an overly broad and discriminatory rule prohibiting its employee from communicating with other employees regarding their terms and conditions of employment and threatened employees who violated the rule with unspecified reprisals. The initial allegation is established in the December 18, 2009 email that Parker sent to Wicke stating, inter alia: ". . . please, in the future, don't discuss your pay or your plans with others when it comes to things like this. It stirs the pot too much. I am the one to bring it to." This email clearly violates Section 8(a)(1) of the Act as an invalid restriction on his Section 7 rights. As the Board stated in *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 281 (2003):

> It is well established that discussion of wages, benefits, and working conditions is an important part of organizational and other concerted activity. Although employers may have a substantial and legitimate interest in limiting or prohibiting dis-

> cussion about some aspects of their affairs, they may not prohibit employees from discussing their own wages and working conditions or attempting to ascertain the wages of other employees.

However, I find that Walt's January 8, 2010 email to Wicke was a not unreasonable response to Wicke's sarcastic and misdirected January 7, 2010 email, and that alleging it as a Section 8(a)(1) violation is a substantial overreach.

The final allegation is that by terminating Wicke on about January 19, 2010, the Respondent violated Section 8(a)(1) of the Act. Counsel for the General Counsel alleges three theories supporting this allegation: that Wicke was terminated for discussing wages with other employees, for complaining about the manner in which the school spent its Title I funds, and for violating the school's unlawful rule restricting the discussion of employees' wages.

Under *Wright Line*, 251 NLRB 1083 (1980), it is the General Counsel's initial burden to establish that the employee's protected activities were a motivating factor in the employer's decision. Once that is established, it is the employer's burden to establish that it would have taken the same adverse action even absent the employee's protected conduct. Counsel for the General Counsel's burden is established through the testimony and e-mails of Parker. In December 2009, Wicke met with Parker and Carol Parker, compared his salary with two other employees, and asked for an increase in pay. In an email dated December 18, 2009, denying this request, Parker stated, inter alia: "One last thought, please in the future, don't discuss your pay or your plans with others when it comes to things like this. It stirs the pot too much. I am the one to bring it to." In addition, in the same e-mail, Parker commented on Wicke's work performance: "Mr. Webb says that your work is good and that you are very diligent, and I already knew that. But coming from others helps . . . You are a valuable asset."

> As to the reason for Wicke's discharge, Parker's affidavit given to the Board states:
>
> The reason I terminated Wicke was disruption of the school atmosphere and going outside the boundaries of his job description by looking into other peoples' salaries, comparative to his own. This was none of his business . . . Wicke personally questioned me regarding how I paid people. This suggested a loyalty problem with him.

Parker testified that he is sure that this portion of his affidavit was accurate. While Carol Parker testified that Wicke was difficult to work with, was not a "team player," made accusations that were not true and did his best "to find everything wrong that he could possibly find," two weeks before he was discharged she sent him an e-mail ending: "Thank you for what you do. I truly believe we are more compliant with our Title I program than we have been in the past due to your efforts. You are moving us forward leaps and bounds." Also relevant in establishing General Counsel's burden is that Wicke was given no warning, or reason, for his discharge. He was terminated by a voice mail left on his phone simply stating that his services were no longer needed. Even without factoring in Wicke's numerous complaints about the expenditure of Title I funds (whether warranted or not) I find that the evidence clearly sustains General Counsel's initial burden that his protected conduct was a motivating factor in the Respondent's decision to terminate him. The final question then is whether the Respondent satisfied its burden that it would have fired him even absent his protected conduct. I find that it has not done so. As stated above, within a month of his discharge, Wicke was sent e-mails from both Parker and Carol Parker complimenting him on the quality of his work. Although some of his e-mails were sarcastic and abrasive, and as Webb testified Wicke could be arrogant, there was no evidence that his work was ever criticized or that he was ever warned about the quality of his work. Finally, that he was fired abruptly on January 19, 2010, without warning or a reason, further establishes that his discharge resulted from his protected conduct. I therefore find that by terminating Wicke on January 19, 2010, the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by maintaining some rules in its Employee handbook, and in the Power Point presentation made to its employees, which restrict employee Section 7 rights and by telling Wicke that he was not to discuss his pay with other employees.
3. The Respondent violated Section 8(a)(1) of the Act by discharging Wicke on about January 19, 2010.
4. The Respondent did not violate the Act as otherwise alleged.

THE REMEDY

Having found that the Respondent unlawfully discharged Wicke, I recommend that Respondent be ordered to offer him immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, and to make him whole for all loss of earnings and other benefits as set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), along with interest as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). I have also found that certain portions of the Respondent's Employee handbook and Power Point presentation violate Section 8(a)(1) of the Act because they overly restrict employee Section 7 rights. I therefore recommend that Respondent be ordered to delete from the Non-Disclosure provision of the handbook the sentences: "All employee contracts are individually negotiated. Therefore, discussing specific employee contract terms and compensation is prohibited and subject to disciplinary action including, but not limited to termination" as well as the words "Compensation Data." As I have found that the term "confidential material" in the Internet Usage provision could unlawfully restrict employee Section 7 rights, that term should be deleted from the Internet Usage provision. Finally, the Power Point presentation explaining the terms of the Employee handbook did not contain the working time caveat contained in the handbook, in violation of Section 8(a)(1) of the Act. I recommend that Respondent be ordered to either delete that provision from the Power Point presentation, or add the working time caveat to it.

ORDER[1]

The Respondent, Excalibur Charter School, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning employees not to discuss their wages with other employees.

(b) Maintaining rules in its Employee handbook and in a Power Point presentation made to its employees that restricts or prohibits employees' Section 7 rights.

(c) Discharging, or otherwise discriminating against its employees for engaging in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights as guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Delete from its Employee handbook and Power Point presentation the provisions found to be unlawful in the Non-Disclosure, Internet Usage and Solicitation sections as described above.

(b) Within 14 days from the date of this Order offer Wicke full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth above in the remedy section of this Decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Apache Junction, Arizona, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 14, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 26, 2011.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from discussing your wages or other terms of conditions of employment with other employees and WE WILL NOT in our Employee handbook, or in Power Point presentations, restrict you from engaging in the rights guaranteed by Section 7 of the Act.

WE WILL NOT discharge, or otherwise discriminate against you because you engaged in protected concerted activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL delete from our Employee handbook and from our Power Point presentation explaining it, the provisions that restricts you in the exercise of your rights under the Act.

WE WILL offer Nathaniel Wicke immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

from our files any reference to the unlawful discharge of Nathaniel Wicke, and WE WILL, within 3 days thereafter, notify him, in writing that this has been done and that the discharge will not be used against him in any way.

EXCALIBUR CHARTER SCHOOL, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-023039 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.